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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1273

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF THE KANSAS HOSPITAL ASSOCIATION, MISSOURI HOSPITAL ASSOCIATION, OKLAHOMA HOSPITAL ASSOCIATION, AND TULSA AREA HOSPITAL COUNCIL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF AMICI

The *amici*, Kansas Hospital Association, Missouri Hospital Association, Oklahoma Hospital Association and Tulsa Area Hospital Council are nonprofit corporations, the combined membership of which is approximately 400 hospitals.[1] Many of the *amici's* member hospitals maintain no-solicitation rules governing employee conduct.

1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

Like *NLRB* v. *Baptist Hospital, Inc.*, No. 78-223, *cert. granted*, ... U.S. ....., 47 U.S.L.W. 3463 (January 8, 1979), this case concerns the right of hospitals to regulate employee solicitation and distribution in areas of the hospital to which patients and visitors have access. The United States Court of Appeals for the Tenth Circuit, in *NLRB* v. *National Jewish Hospital and Research Center*, No. 77-1061, ... F.2d ..... (10th Cir. 1978), enforced the decision of the National Labor Relations Board that the hospital's no-solicitation rule was unlawful because it restricted solicitation on nonworking time in areas of the hospital other than immediate patient care areas. The Court of Appeals held that in order to justify its rule the hospital must prove that actual harm to patients or actual disruption of patient care had resulted from employee solicitation. It rejected expert medical testimony concerning the likelihood of harm to patients or the likelihood of disruption to patient care[2] as insufficient to meet the burden of proof that was articulated by this Court in *Beth Israel Hospital* v. *NLRB*, ... U.S. ....., 98 S. Ct. 2463 (1978).

If the *National Jewish* decision is permitted to stand, numerous of the member hospitals of the *amici* will be required to show actual harm or disruption of care before they can enact a broad prohibition on employee solicitation activity. Furthermore, if the Tenth Circuit's decision is followed by other Courts of Appeals, such a showing could be required for each of the more than 7,000 hospitals in the United States. The impact on patients of such a requirement would be disastrous, and such a result could not have been intended by this Court in *Beth Israel, supra.*

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2. Transcript at 59-68, 73, 75 and 130.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other Courts of Appeals, and conflicts in principle with this Court's Beth Israel decision, as to the quantum of proof required to justify a broad no-soliciation rule.

The petition for a writ of certiorari should be granted because the decision of the Tenth Circuit conflicts with the decisions of the Sixth Circuit in *NLRB* v. *Baptist Hospital, Inc.*, 576 F.2d 107 (6th Cir. 1978), *cert. granted*, ... U.S. ....., 47 U.S.L.W. 3463 (Jan. 8, 1979), the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB*, 578 F.2d 351 (D.C. Cir. 1978), *cert. granted in part and denied in part*, ... U.S. ....., 47 U.S.L.W. 3298 (Oct. 30, 1978), *on remand*, ... F.2d ....., 100 LRRM 2340 (D.C. Cir. 1979), and conflicts in principle with this Court's decision in *Beth Israel, supra.*

In *Baptist Hospital, supra*, the Sixth Circuit concluded that the hospital had justified its prohibition on employee solicitation in areas to which patients and visitors had access because, "the record contains uncontradicted testimony that these areas are part of the total environment of the hospital where the medical needs of the patients are served by maintaining a climate free of strife and controversy . . . ." *Baptist Hospital, supra* at 110. Two members of the medical staff and the hospital administrator testified that solicitation "would have a *potential* for affecting patients and their families adversely . . . [and] any nonprofessional attitude among hospital employees is upsetting to patients . . . ." *Baptist Hospital, supra*, at 108-09 (emphasis added). They further testified that due to the present-day mobility of patients, there was no relevant

distinction between those areas of the hospital devoted to immediate patient care and other areas of the hospital to which patients and visitors have access. *Baptist Hospital, supra* at 109, 110. Both in *Baptist* and in this case, no evidence was introduced that contradicted in any way the testimony of the hospital's witnesses. *Baptist Hospital, supra* at 109; *National Jewish, supra* at slip. op. 13 (Stanley, J., dissenting).

In *Baylor, supra*, the D.C. Circuit denied enforcement to a decision of the National Labor Relations Board that had held unlawful a prohibition on solicitation in the corridors of the hospital. The Court of Appeals stated:

> [S]olicitation has a disruptive force quite apart from its contribution to noise level and overcrowding. There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital. Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard taxed emotionally. And the thought that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities. It is not only the *likelihood* that congestion and commotion would result from such solicitation, but also the *inherently disturbing effect* of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule. *Baylor, supra* at 356 (emphasis added).

This Court granted certiorari to review that part of the *Baylor* decision that concerned solicitation in the cafeteria. Because the Court of Appeals had applied an incorrect legal standard, this Court remanded for reconsideration in light of *Beth Israel*. *NLRB* v. *Baylor University Medical Center*, ... U.S. ....., 47 U.S.L.W. 3298 (October 30, 1978).

On remand, the Court of Appeals stated:

> Beth Israel decidedly does not hold that a prohibition on solicitation in a cafeteria used by employees is unlawful. The lawfulness of the ban, instead, is determined on the evidence offered in each case; in Beth Israel, evidence that the cafeteria was a natural and well established gathering place for employees, rarely used by others, was regarded as dispositive. *Baylor University Medical Center* v. *NLRB*, ... F.2d ....., 100 LRRM 2340, 2343 (D.C. Cir. 1979).

The Court of Appeals further stated that "while Baylor's evidence may not justify a no-solicitation/no-distribution rule applicable to the entire operating schedule of the cafeteria . . . it does justify . . . a continuation of the ban during some periods." *Baylor University Medical Center* v. *NLRB, supra* at 2344. Therefore, the Court of Appeals again denied enforcement to the Board's order and remanded to the Board with leave to submit a new enforcement order.

Not only is the evidence presented by National Jewish stronger than that which the D.C. Circuit in *Baylor* found sufficient to justify a ban on solicitation, but also the

Tenth Circuit's interpretation of *Beth Israel* differs sharply from that of the D.C. Circuit.

The decision in *National Jewish*, therefore, clearly conflicts with the decisions of the D.C. Circuit and the Sixth Circuit. The Tenth Circuit, applying what it considered to be the law pursuant to this Court's decision in *Beth Israel, supra*, held that the hospital was required to show that patient care had actually been disrupted by employee solicitation, and refused to accord weight to medical testimony concerning the probability of harm and disruption if patients witnessed employees engaged in solicitation. The quantum of proof required by the Tenth Circuit to justify a broad no-solicitation rule is thus significantly different from that required by the Sixth Circuit or the D.C. Circuit.

Not only is there a conflict among the circuits, but there is also a conflict in principle with this Court's decision in *Beth Israel, supra*. In *Beth Israel*, the Court stated:

> We . . . hold that the Board's general approach of requiring health care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients is consistent with the Act. *Beth Israel, supra* at 2477.

Assuming, for the sake of argument, that the Court in *Beth Israel* settled the burden of proof question, it did not, as the Tenth Circuit has erroneously concluded, settle the quantum of proof question. There is no indication in the Court's *Beth Israel* decision that the quantum of proof necessary to justify a broad prohibition on solicitation is that actual harm or disruption to patient care must be shown. On the contrary, throughout its decision in

Beth Israel, the Court refers to whether there is a "*likelihood* of disruption," whether there is a "*substantial threat* of harm," and whether "solicitation or distribution . . . *would be* harmful." *Beth Israel, supra* at 2473, 2474, and 2475 (emphasis added).[3]

The quantum of proof required by the Tenth Circuit is thus far greater than that which this Court implied in *Beth Israel*. Surely this Court did not intend to impose so great a burden upon the health care industry and to so jeopardize the patients it serves.

These conflicts justify the grant of certiorari to review the judgment below.

2. The decision below raises an important question of federal law which has not been, but should be, settled by this Court.

The fact that the Court has granted certiorari in *Baptist Hospital, supra*, attests to the importance of the question presented in this case. The validity of no-solicitation rules in hospitals has been, and will undoubtedly continue to be, an issue on which certiorari is sought unless the Court unequivocally disposes of the issue.

If this case is consolidated with the *Baptist Hospital* case, the Court will have the opportunity to fully address

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3. This approach is consistent with prior decisions of the National Labor Relations Board. In *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 111 (1972), for example, the Board stated that "a hospital need not wait until an untoward incident actually takes place before undertaking reasonable measures to anticipate and forestall such an occurrence." *See also May Department Stores*, 59 NLRB 976 (1944), *enforced*, 154 F.2d 533 (8th Cir. 1945), *cert. denied*, 329 U.S. 725 (1946), in which the Board upheld a no-solicitation rule based upon "conceivable" harm; *McDonald's Corp.*, 205 NLRB 404 (1973), in which the Board upheld a rule based upon "potential" harm; and *Bankers Club, Inc.*, 218 NLRB 22 (1975), in which the Board upheld a rule based upon "possible" harm.

all aspects of the no-solicitation rule issue. The Court will thus be able to finally settle this important question of federal law that affects not only the more than 7,000 hospitals in the United States, but also the hundreds of thousands of patients whom they serve.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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